

No. 13880

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARIE BALLENTINE, as Guardian of the Estate of Stephen
William Ballentine,

Appellant,

vs.

MARIE DESYLVA,

Appellee.

MARIE DESYLVA,

Appellant,

vs.

MARIE BALLENTINE, as Guardian of the Estate of Stephen
William Ballentine,

Appellee.

Appeal From the United States District Court for the
Southern District of California, Central Division.

CROSS-APPELLANT'S OPENING BRIEF.

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CROSS-APPELLANT'S OPENING BRIEF.

Appeal from the United States District Court, South-
ern District of California, Central Division.

I.

Jurisdiction of District Court.

This is a cross-appeal from a judgment of the District
Court of the United States for the Southern District of
California, Central Division, entered April 29, 1953.

Cross-appellee, as guardian of the estate of Stephen William Ballentine, filed her complaint in the District Court for declaratory judgment and for an accounting as to alleged rights in and to renewals and extensions of copyrights. Cross-appellant filed her answer and on motion by each party for summary judgment, the court ordered judgment.

Jurisdiction of the action in the District Court was founded upon Title 28, U. S. Code, Section 1338(a), providing for original jurisdiction in the United States District Court of any civil action arising under any Act of Congress relating to copyrights. The declaratory judgment was authorized by Section 2201 of Title 28, U. S. Code, as it involved an interpretation by the court of Section 24, Title 17, U. S. Code, relating to extensions and renewals of copyrights.

II.

Jurisdiction of the United States Court of Appeals.

This Honorable Court has jurisdiction to review the judgment rendered by the District Court under the provisions of 28 U. S. C. A., Sections 1291 and 1294.

III.

Statement of the Case.

George G. DeSylva, who died July 11, 1950, was an author and composer of musical works, many of which were copyrighted during the last 28 years of his life, and was the owner or part owner of said copyrights. Since his death, a number of copyrights were renewed in the name of Marie DeSylva, his widow and cross-appellant herein. Other copyrights will, in the future, come up for renewal.

Marie Ballentine, as the mother and guardian of the estate of Stephen William Ballentine, cross-appellee herein, filed a complaint in the District Court herein on August 8, 1952, contending that as the son of George G. DeSylva, Stephen William Ballentine was equally entitled with Marie DeSylva, widow of George G. DeSylva, to the renewals and extensions of said copyrights and prayed for a declaratory judgment and for an accounting.

Cross-appellant, on January 7, 1953, filed her answer herein, contending that in accordance with the provisions of Section 24, Title 17, U. S. Code, relating to the extensions and renewals of copyrights, she, as the widow of George G. DeSylva, is the sole owner of the renewals and extensions of all copyrights in which George G. DeSylva, deceased, had an interest, and further contended that the said Stephen William Ballentine is not a child of the deceased, George G. DeSylva, within the meaning of Section 24, Title 17, U. S. Code, and prayed for a declaration of the rights and duties of the respective parties and for a declaration that she is the sole owner of said renewals and extensions of copyrights.

Motions were made by both parties for summary judgment.

It was stipulated between the parties that Stephen William Ballentine is the son of George G. DeSylva, deceased, and of Marie Ballentine, and also that the said George G. DeSylva and Marie Ballentine were not married at the time of the birth of Stephen William Ballentine, or at any other time.

By affidavit in support of cross-appellee's motion for summary judgment, Leon Kent, attorney for cross-appellee, set out facts to the effect that George G. DeSylva

had in his will and in a complaint and an amended complaint in an action in the Superior Court of the State of California, in and for the County of Los Angeles, acknowledged Stephen William Ballentine to be his son.

In a judgment entered April 29, 1953, the District Court held that in accordance with Section 24, Title 17, U. S. Code (the section relating to persons entitled to renewals and extensions of copyrights) so long as cross-appellant, Marie DeSylva, is alive she, as the widow of George G. DeSylva, is the sole owner of all rights to renewals and extensions of all copyrights in which George G. DeSylva had an interest and that cross-appellee has no present right to an accounting nor will have any right to an accounting so long as cross-appellant, Marie DeSylva, is alive.

It is noted that the judgment of the District Court was generally in favor of cross-appellant. This cross-appeal, however, follows because in its Conclusions of Law the District Court declared that Stephen William Ballentine is a child of George G. DeSylva, deceased, within the meaning of the statutes of the United States relating to copyrights [Conclusion of Law 2, Tr. p. 32].

Cross-appellee within the time allowed by law appealed and cross-appellant within the time allowed by law filed her cross-appeal from that portion of the judgment only which incorporates the conclusion of law of the District Court that Stephen William Ballentine is a child of George G. DeSylva, deceased, within the meaning of the statutes of the United States relating to copyrights.

IV.

Specification of Error.

Cross-appellant hereby makes the following Specification of Error:

That the District Court erred in its conclusion of law that Stephen William Ballentine is a child of George G. DeSylva, deceased, within the meaning of the statutes of the United States relating to copyrights.

V.

Summary of Argument.

It is cross-appellant's position herein that an illegitimate child is not a child within the meaning of Section 24, Title 17, U. S. Code, which confers upon certain specifically named persons rights to renewals and extensions of copyrights, and it is further contended that the mere acknowledgment of an illegitimate child, within the meaning of Section 255, of the Probate Code of the State of California, does not amount to legitimation of such child, and hence adds nothing to the status of the child within the meaning of the aforesaid copyright statute.

VI.

Preliminary Statement.

When this case was submitted to the District Court for decision, the court had before it a stipulation of the parties that Stephen William Ballentine, also known as Stephen William Moskovita, is the son of George G. DeSylva and of Marie Ballentine and that the said George

G. DeSylva and Marie Ballentine were not married at the time of the birth of Stephen William Ballentine or at any other time [Tr. pp. 20-21]. Also, the court found as a fact that Marie Ballentine is the mother of Stephen William Ballentine and that George G. DeSylva and Marie Ballentine were not husband and wife at the times of the conception and birth of said child [Finding of Fact 3, Tr. p. 30].

The court also found that the child had been acknowledged by George G. DeSylva within the meaning of Section 255 of the Probate Code of the State of California [Tr. p. 30].

Section 255 of the Probate Code provides as follows :

“Every illegitimate child is an heir of his mother, and also of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father, and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he does not represent his father by inheriting any part of the estate of the father’s kindred, either lineal or collateral, unless, before his death, his parents shall have intermarried, and his father, after such marriage, acknowledges him as his child, or adopts him into his family; in which case such child is deemed legitimate for all purposes of succession. An illegitimate child may represent his mother and may inherit any part of the estate of the mother’s kindred, either lineal or collateral.”

It is noted that this statute does not purport to legitimate an illegitimate child except where the child’s parents intermarried. In this case, it has been stipulated that the parents of Stephen William Ballentine were never

married at any time [Tr. p. 20]. Hence, for purposes of this argument, Stephen William Ballentine is considered an illegitimate child.

The consequences, if any, of acknowledgment upon the question as to whether an illegitimate child is included within the term "child" in the copyright law will be discussed later herein.

The court concluded as a matter of law that Stephen William Ballentine is a child of George G. DeSylva, deceased, within the meaning of the statutes of the United States relating to copyrights [Tr. p. 32]. The pertinent copyright law here involved in Section 24, Title 17, U. S. Code, relating to duration, renewal and extension of copyrights, a portion of which statute provides:

"* * * And provided further, That in the case of any other copyrighted work, including a contribution by an individual author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years * * *. (July 30, 1947, c. 391, §1, 61 Stat. 652.)"

In the absence of any direct case authority, the District Court construed Section 24, Title 17, to include an illegitimate child within the meaning of the term "children" in said statute.

Cross-appellant will argue herein that both at common law and under American statutes, both state and fed-

eral, the words "child" or "children" mean only legitimate child or children; further that Section 24, Title 17, U. S. Code, requires the aforesaid historical meaning of the terms "child" and "children"; and further that the mere acknowledgment of Stephen William Ballentine by George G. DeSylva as his son does not change the ordinary meaning to be given to the words "child" or "children" under the copyright statute.

VII.

At Common Law, the Words "Child" or "Children" Meant Only a "Legitimate" Child or Children.

At common law, an illegitimate child meant *filius nullius*, the child of nobody, or *filius populi*, a child of the people. Such a child had no father known to the law and indeed not even a mother. (See 7 Am. Jur. 627.)

So deeply entrenched in the common law was this concept that in a suit brought by an illegitimate child against a railway company for damages under Lord Campbell's Act, the English predecessor of our wrongful death statute, the court held that the word "child" in Lord Campbell's Act (Sec. 2, 9 & 10 Vict. c. 93) did not include the plaintiff illegitimate child. (*Dickinson v. North-eastern Ry. Co.*, 9 Law Times Rep. 299 (1863).)

Pollock, C. B., said at page 300:

"We are all agreed that the application for this rule must be refused. We have no doubt that in *this Act of Parliament as in all others*, the word 'child' means 'legitimate' child only; and I should be very sorry to throw the least doubt upon the point by granting the present rule." (Emphasis supplied.)

In a case involving the construction of a will, Lord Eldon used the following emphatic language:

“The rule cannot be stated too broadly that the description ‘child, son, issue,’ every word of that species, must be taken *prima facie* to mean legitimate child, son or issue.”

Wilkinson v. Adam, 1 Ves. & Bea. 422, 462, 35 Eng Rep. 179.

There are numerous expressions by the United States Supreme Court to the same effect.

In *McCool v. Smith*, 66 U. S. 218, 1 Black 459 (1861), Mr. Justice Swayne said (66 U. S. 221):

“By the rules of the common law, terms of kindred, when used in a statute, include only those who are legitimate unless a different intention is clearly manifested.”

VIII.

The Words “Child” or “Children” in American Statutes Generally Mean Legitimate Child or Children.

Frequently, American courts have had occasion to interpret the meaning of the words “child” or “children” in statutes where the statutes themselves do not define such words. Thus, interpreting compensation acts, the courts have generally held that the word “child” or “children” in such statutes mean only legitimate child or children.

See:

In re Dragoni, 53 Wyo. 143, 79 P. 2d 465 (1938);
Luskin v. Triangle Farms (La. App.), 24 So. 2d 213, 215 (1945);

Bell v. Terry & Tench Co., 163 N. Y. Supp. 733,
735, 177 App. Div. 123 (1917);

Balanti v. Stineman, 131 Pa. Sup. 344, 200 Atl.
236;

Gritta's Case, 236 Mass. 204, 127 N. E. 889.

Also, courts have similarly interpreted the words "child" or "children" in construing wrongful death statutes.

See:

Brinkley v. Dixie Const. Co., 205 Ga. 415, 54
S. E. 2d 267, 268;

Adams v. Powell, 67 Ga. App. 460, 21 S. E. 2d
111, 112;

Washington B. & A. R. Co. v. State, 136 Md.
103, 111 Atl. 164, 169.

In *Jung v. St. Paul Fire Dept. Relief Assn.*, 223 Minn. 402, 27 N. W. 2d 151 (1947), the court had before it the question as to whether the plaintiff, a minor child born out of wedlock, was a person included as a beneficiary of a pension under Minnesota Statute of 1935, Section 69.48, which provided in part:

"(2) A child or children * * * (such) widow and the child or children shall be entitled to a pension * * *."

In this case, the child's father had, in writing and before a competent attesting witness, declared himself to be the father of plaintiff. The factual situation was, therefore, similar to that involved in the present case.

In addition, Minnesota Statute, Section 525.172, provided:

“An illegitimate child shall inherit from his mother the same as if born in lawful wedlock, and also from the person who in writing and before a competent attesting witness shall have declared himself to be his father; but such child shall not inherit from the kindred of either parent by right of representation.”

It will be noted that this statute is very similar to Section 255 of the Probate Code of the State of California on which cross-appellee apparently relies and did rely in the cross motions for summary judgment before the District Court.

The Minnesota court held that the relief statute was in no way controlled by the statute providing for inheritance by an illegitimate child. The court said (223 Minn. pp. 406-7):

“Obviously, the foregoing statute pertains to, and confers only, the right of inheritance. It is not *in pari materia* with §69.48 so as to provide any basis whatever for construing the two statutes with reference to each other. It is also clear that the legislature did not intend thereby to abrogate the common-law rule generally, but only with respect to the right of inheritance, and then in a limited degree. No recognized rule of construction permits this court to invade the province of the legislature by a process of destroying or distorting express statutory provisions intended to limit the application of a statute.

Not only must this section be confined to the field of inheritance, but also to a restricted portion of that field.”

The court further said at page 407:

“We have made nothing more than ‘some progress’ in ameliorating the harsh rule of the common law. See, *In re Estate of Snethun*, 180 Minn. 202, 230 N. W. 483. The cautious and specific manner in which the legislature granted to illegitimates a limited right of inheritance indicates that it intended thereby to establish not a repeal of, but only an exception to, the general rule.”

The question of the right of an illegitimate child to inherit from the father, even though publicly acknowledged by the father during his life, is considered at length in the case of *Pfeifer v. Wright*, 41 F. 2d 464. In that opinion, the Tenth Circuit considered the right of an illegitimate child to inherit the Oklahoma property of her deceased father by reason of his acknowledgment of the child in Kansas as his daughter. By the terms of the pertinent provisions of the Kansas law, it appears that the rights of an illegitimate child and his rights to inheritance are much the same as those under Section 255 of the California Probate Code. Even though it was quite clear that the decedent had acknowledged the child, as he had here, the child was not permitted to take any interest in the Oklahoma property, and certiorari was denied by the Supreme Court of the United States, 282 U. S. 896, 78 L. Ed. 789.

IX.

The Copyright Law Requires the Ordinary Meaning of "Legitimate" Child or Children for the Words "Child" and "Children."

It will be noted that Section 24, Title 17, U. S. Code, the interpretation of which was at issue before the District Court, and further a review of the entire copyright statutes reflect that nowhere is the word "child" or "children" defined.

There are no provisions made for illegitimate children in Section 24, Title 17, U. S. Code, and it is submitted that had Congress intended to include an illegitimate child as one of the beneficiaries of the right of renewal to a copyright, that right would have been specifically spelled out as has been done in the Veterans Pension Act, 38 U. S. C. 505, 38 U. S. C. 667.

In *Mayers, et al. v. Ewing*, 102 Fed. Supp. 201 (U. S. D. C., E. D. Pa., 1952), it was held that illegitimate children of a fully insured male wage earner who died domiciled in Pennsylvania were not considered "children" of their father for purposes of devolution of intestate personal property and hence they were not eligible for insurance benefits under the Social Security Act.

This decision was based upon the meaning of the word "children" within Sections 202(c), 209(k) and 209(m) of the Social Security Act (42 U. S. C. A. 402(d), also 42 U. S. C. A. 416(e), and 42 U. S. C. A. 416(h)(1).

Under the Social Security Act, the meaning of the word "child" was determined by the law of the state of domicile of the insured individual. The court found that

under Pennsylvania law, even though the illegitimate children were recognized by the deceased wage earner as the father and had lived with him as part of his family, they nevertheless were not entitled to benefits under the act.

In the present case, in the absence of any statutory provision in the copyright law for illegitimate children, it is submitted that the word "children" in Section 24, Title 17, U. S. Code, must be given its ordinary, historical meaning of legitimate children.

Cross-appellant has been unable to find any case in which the words "child" or "children" in the copyright statutes have been construed by the courts. In this situation, it is submitted that the foregoing argument indicates that the construction of the word "children" herein should be the one generally and customarily followed by American courts, federal and state, and based upon the common law.

The federal courts have generally construed the word "wife" in federal statutes to mean a legal wife and not to include a "putative wife."

See:

Lawson v. United States, 192 F. 2d 479 (2d Cir., 1951).

Also:

Bolin v. Marshall 76 F. 2d 668, cert. den., 296 U. S. 573 (9th Cir., 1935).

In the *Bolin* case, the common-law wife was held not to be the wife and widow of the deceased under the Longshoremen and Harbor Workers Act (33 U. S. C., Secs. 901-950).

X.

The Status of Stephen William Ballentine, Under California Law, Is That of an Illegitimate Child and Hence He Is Not Included as a Child in the Copyright Act.

In determining the status of the child, Stephen William Ballentine, the court may look to the status of the child under California law. (See: *Bolin v. Marshall, supra.*)

In the present case, it is clear that Stephen William Ballentine is an illegitimate child, since his mother and father were never married at any time, and further since there was no evidence before the District Court that the child was ever legitimated under Section 230 of the Civil Code of California, which provides as follows:

“The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this chapter do not apply to such an adoption.”

It will be noted that at no time, until after the hearings of April 10 and 14, 1953, did cross-appellee make the contention that Stephen William Ballentine is a legitimated child within the meaning of Section 230, Civil Code of California. A belated attempt to advance this contention was made in the affidavit of Leon E. Kent in opposition to Defendant's Motion for Summary Judgment, dated April 17, 1953, and filed April 20, 1953 [Tr. pp. 27-29]. Even if such affidavit were properly before the court, which cross-appellant denies, the affida-

vit shows on its face that even if the affiant could testify as he stated in his affidavit, to-wit, that the decedent publicly acknowledged plaintiff as his own child and received plaintiff into his family and otherwise treated plaintiff as if he were a legitimate child [Tr. p. 28], this would still not amount to legitimation under Section 230 of the Civil Code, since the contention has no where been made by way of affidavit or otherwise that the father of Stephen William Ballentine *with the consent of his wife* received the child into his family. This is one of the essential elements of legitimation under Section 230, Civil Code.

See:

Flood's Estate, 217 Cal. 763, 21 P. 2d 579.

As disclosed by the original affidavit in support of cross-appellee's motion for summary judgment [Tr. pp. 16-17], the theory and facts upon which cross-appellee relied in submitting the matter to the District Court for summary judgment was to the effect that the child had been acknowledged by George G. DeSylva within the meaning of Section 255 of the Probate Code of California.

It is clear that Section 255 of the Probate Code has nothing to do with legitimation and is simply a statute of succession. (See: *Flood's Estate*, *supra*.)

Also:

Wong v. Young, 80 Cal. App. 2d 391, 181 P. 2d 741 (1947).

In *Wong v. Wong Hing Young*, an action was brought by the mother as guardian *ad litem* for support under Section 196(a), Civil Code of the State of California. It

was alleged that the child was born out of wedlock and in the answer the father, as defendant, admitted the paternity and the only issue was as to the amount required for support and for attorney's fees. In the DeSylva case the same section was in controversy and except for names and amounts the same issue involved. In the judgment in the *Wong* case, it was provided as follows:

“It is ordered, adjudged and decreed that the plaintiff herein is the legitimate daughter * * *.”

The defendant appealed on the ground that the portion of the judgment finding that the child was the legitimate daughter was in error and the court held that he was entirely correct, using the following language (80 Cal. App. 2d 391, 394, 181 P. 2d 741, 743):

“Plaintiff next contends that, even if there were no legitimation under section 230 of the Civil Code, there was such legitimation under section 255 of the Probate Code. For the purposes of that section all that is required is an acknowledgment in writing of the relationship signed in the presence of a competent witness. While it is undoubtedly true that the admission of paternity in a verified pleading satisfies that section, the fallacy of plaintiff's position is that section 255 of the Probate Code is not a full legitimation statute but simply a statute of succession.”

In the light of the situation disclosed above, it is submitted that the status of the child under California law is clearly that of an illegitimate child and that the court should have, therefore, construed Section 24, Title 17, U. S. Code, and the word “children” therein so as to exclude Stephen William Ballentine, an illegitimate child.

Conclusion.

Since Section 24, Title 17, U. S. Code, relating to extensions and renewals of copyrights, is silent as to the meaning of the word "children" contained therein, and since the copyright statutes make no specific provision whatsoever for illegitimate children, and further since under California law the status of Stephen William Ballentine is that of an illegitimate child, it is therefore submitted that the judgment of the trial court should be reversed only in so far as it includes the conclusion of law that Stephen William Ballentine is a child of George G. DeSylva, deceased, within the meaning of the statutes of the United States relating to copyrights.

It is submitted that such conclusion was erroneous in view of the foregoing and because under state and federal decisions following the common law, the words "child" and "children" are held to mean legitimate child and children.

Respectfully submitted,

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